

DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER: 97-0069

Sales and Use Tax

For The Period: 1993 Through 1995

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ISSUES

I. Sales/Use—Continental Breakfasts

Authority: IC 6-2.5-5-20; Hyatt Corp. v. Indiana Dept. of State Revenue, 695 N.E.2d 1051 (Ind. Tax 1998)

Taxpayer protests the proposed assessment of Indiana use tax on its breakfast expenditures providing complimentary continental breakfasts to its customers.

STATEMENT OF FACTS

Taxpayer owns and operates a hotel located in Indiana. Taxpayer offers, as part of its guest amenity package, a complimentary continental breakfast. This breakfast includes items such as bagels, rolls, muffins, and fresh fruit, along with juice and coffee. Taxpayer did not pay Indiana gross retail tax (sales tax) or self-assess use tax on these items.

I. Sales/Use Tax—Continental Breakfasts

DISCUSSION

Taxpayer protests proposed assessments attributable to its breakfast and coffee expenditures.

Taxpayer, an operator of a hotel, provides a complimentary continental breakfast to its guests. Taxpayer also provides free amenity meals for its "Priority Club" members, and the taxpayer

provides free snacks for its patrons. In addition, the taxpayer provides free meals to its full-time employees.

In Indiana, a sales tax is imposed on retail transactions. The sales tax is mirrored and complimented by the “use tax.” In general, either the sales tax or the use tax will apply. The complimentary formulation of the sales/use tax system exists to ensure that nonexempt retail transactions that escape sales tax liability are nonetheless taxed via the use tax. The use tax is imposed on tangible personal property that is stored, used, or consumed in Indiana.

Several exemptions from the sales and use tax provisions are available.

One such exemption is for the sale of food intended for human consumption. As Indiana Code 6-2.5-5-20 instructs:

- (a) Sales of food for human consumption are exempt from the state gross retail tax.
- (b) For purposes of this section, the term “food for human consumption” includes:
 - (1) cereals and cereal products; (2) milk and milk products, including ice cream; (3) meat and meat products; (4) fish and fish products; (5) eggs and egg products; (6) vegetables and vegetable products; (7) fruit and fruit products, including fruit juices; (8) sugar, sugar substitutes, and sugar products; (9) coffee and coffee substitutes; (10) tea, cocoa, and cocoa products; (11) spices, condiments, extracts, and salt; (12) oleomargarine; and (13) natural spring water.
- (c) For the purposes of this section, the term “food for human consumption” does not include:
 - (1) candy, confectionery, and chewing gum; (2) alcoholic beverages; (3) cocktail mixes; (4) soft drinks, sodas, and other similar beverages; (5) medicines, tonics, vitamins, and other dietary supplements; (6) water (except natural spring water), mineral water, carbonated water, and ice; (7) pet food; (8) food furnished, prepared or served for consumption at a location or on equipment provided by the retail merchant; (9) meals served by a retail merchant off the merchant’s premises; (10) food sold by a retail merchant who ordinarily bags, wraps, or packages the food for immediate consumption on or near the merchant’s premises, including food on a “take out” or “to go” basis; and (11) food sold through a vending machine or by a street vendor.

Thus “food for human consumption” is a term of art—it does not include all that is edible. Subsection (b) defines the term by listing inclusions, and subsection (c) limits through exclusions.

In Hyatt Corp. v. Indiana Dept. of State Revenue, 695 N.E.2d 1051 (Ind. Tax 1998), the tax court defined the scope of IC 6-2.5-5-20. In Hyatt the petitioner, a hotel operator, sought a refund for use tax paid on food purchased for complimentary meals. The meals were provided to both guests and employees. The court, in reaching its decision, reasoned that if the food purchased was exempt as “food for human consumption” under subsection (b), and not excluded under (c), the exemption must apply. Id. at 1054. The court commented that a subsequent use of exempt food would not effect its original exempt status. As the court stated:

The fact that Hyatt eventually prepared the food it had purchased is irrelevant. Eligibility for this [food for human consumption] exemption provision does not turn on what is done with the food after the relevant [sales] transaction.

Id. at 1055, footnote 6.

What was important to the court in Hyatt was the fact that the petitioner had purchased *unprepared* food. Thus the court distinguished Hyatt from U.S. Air, Inc. v. Indiana Dept. of State Revenue, 542 N.E.2d 1033 (Ind.Tax 1993). In U.S. Air the court determined that the meals purchased were *prepared* meals and the court analogized that “the food purchased by USAir is best compared to ‘take out’ food.” Id. at 1038. The court also stated that “nothing further had to be done to the food other than serving it to the passengers and crews.” Id. at 1039. In Hyatt the court found that the exclusionary language of (c)(8) through (c)(11) meant that the “legislature intended to exclude transactions involving *prepared* food from the definition of ‘food for human consumption.’” Hyatt at 1054. (Emphasis added) Since Hyatt purchased food covered by the subsection (b) exemptions, and the food, as unprepared, did not come within the scope of (c)(8) through (c)(11), the food purchases were qualified for exempt treatment.

Taxpayer’s position is similar to that of Hyatt. Taxpayer purchased unprepared food items and beverages—e.g., bagels, rolls, fruit, coffee, and fruit juices. These items are included in subsection (b) of the statute—*viz.*, the list of exempt items. As unprepared food, these items were not obtained in a subsection (c) sales transaction. Therefore, the Department finds that the taxpayer’s food and beverage purchases, like that of Hyatt, are exempt from sales and use tax under IC 6-2.5-5-20.

FINDING

The taxpayer’s protest is sustained.